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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. TONY HUYNH, Defendant and Appellant.	B203379 (Los Angeles County Super. Ct. No. NA073150)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gary J. Ferrari, Judge. Affirmed in part, reversed in part and remanded.

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Stephanie A. Miyoshi and Beverly K. Falk, Deputy Attorneys General, for Plaintiff and Respondent.

Tony Huynh (defendant) was convicted of attempted murder and various other serious felony charges and allegations after he discharged a firearm from a car at a rival gang member and wounded the rival gang member's girlfriend.

He appeals from the judgment and contends that (1) the evidence is insufficient to support his convictions of attempted murder; (2) there is sentencing error; and (3) his sentence constitutes cruel and unusual punishment.

We will affirm the convictions, reverse the orders of sentencing, and order a remand for resentencing.

THE CONVICTIONS

In a jury trial, defendant was convicted of two counts of attempted murder (Pen. Code, §§ 664, 187, subd. (a); counts 1 & 2),[1] with a finding that the attempted murder in count 2 was willful, deliberate, and premeditated (§ 664, subd. (a)); of three counts of discharging a firearm from a motor vehicle (§ 12034, subd. (c); counts 4, 5 & 6); and of three counts of assault with a semiautomatic firearm (§ 245, subd. (d); counts 7, 8 & 9). In counts 1 and 4, the jury made findings of the discharge of a firearm proximately causing great bodily injury (§ 12022.53, subd. (d)). In counts 2, 5, and 6, it made findings of the discharge of a firearm (§ 12022.53, subd. (c)). In count 7, it found true enhancements for the use of a firearm and the infliction of great bodily injury (§§ 12022.5, 12022.7, subd. (a)). As to all counts, it made findings that the offenses were violent felonies committed for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)(C)).

FACTS

At about 8:00 p.m. on January 22, 2007, 17-year-old Joe M. (Joe), his 17-year-old girlfriend, Stacey R. (Stacey), and Stacey's cousin, 15-year-old Chantel M. (Chantel), were standing in the common driveway in front of Joe's Long Beach residence. They were just talking, "hanging out," and "joking around." At trial, Joe testified that Stacey

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

was about five to six feet away from him. Stacey testified that Joe was about 18 feet from her.[2]

A white sedan drove by the trio and then drove by again. Suddenly, shots rang out. Joe threw Stacey to the ground and jumped atop her to protect her. The assailant nevertheless shot and wounded Stacey in the thigh. After the shooting, Stacey was hospitalized for two weeks. She testified that she continues to suffer pain from the shooting, but the doctors deemed it to be "too risky" to remove the bullet.

Long Beach police officers responded to the scene. Joe told Officer Todd Neveling that he, Stacey, and Chantel were standing there "next to each other" talking. Joe saw a white four-door sedan drive by a couple of times as they were talking. Suddenly, the car stopped, and he heard two gunshots ring out. Joe saw the shadows of three persons in the sedan. The gunshots came from the right rear passenger window. After the shooting, the car was driven northbound, away from the scene.

Chantel told Officer Lori Briney that she was standing on the driveway at Joe's residence with Joe and Stacey. She saw an "older model white sedan" drive by and then come down the block again. On its second pass, she saw muzzle flashes coming out of the passenger side of the car. She heard approximately four gunshots and jumped in between two cars parked on the driveway.

At the hospital, Stacey told Officer Briney that the three of them were standing in the common driveway to Joe's residence. A white car drove by, but she paid no attention to it. Then she heard one or two gunshots.

At trial, Joe acknowledged that he was a Northside Longo gang member. He testified that he did not want to be labeled a "snitch."[3] He agreed that snitches get "beat

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[2] Though they testified at trial, Joe, Stacey, and Chantal recanted certain aspects of the shooting and refused to acknowledge their identifications of the Mercedes. The events of the shooting were established by the officers' testimony of the victims' extrajudicial statements on the night of the shooting.

[3] A "snitch" is a person who tells on other persons involved in gangs.

up." Chantel refused to define a "snitch." But she testified that she would be "mad" if anyone called her such a name.

At the shooting scene, two .380-caliber expended casings, one .22-caliber expended casing, and screwdriver wrapped in tape that was apparently modified to be a weapon were recovered. The expended .22-caliber casing and the screwdriver were found on Joe's driveway.

Shortly after 8:00 p.m. that same night, Detective Jerry Poole, his partner Detective Robert Owens, and a deputy probation officer had several people detained behind an apartment complex at 5663 Cherry Avenue in Long Beach, a mile and a half away from the shooting. Detective Poole heard the call concerning the shooting and that the assailants were driving a white or beige sedan. Suddenly, a white four-door Mercedes occupied by four Asian youths pulled into the rear of the apartment complex. Defendant was seated in the right rear seat. All four occupants emerged. One of the young men walked out of sight. The other three youths walked toward the officers. The detectives and the probation officer were dressed in black polo shirts and jeans. When the defendant and his two companions realized that the detectives were police officers, they quickly moved around a car to avoid the law enforcement officers.

Detective Poole detained defendant and conducted a patdown search which yielded a loaded .380-caliber semiautomatic pistol from defendant's front pocket. Detective Poole radioed officers at the shooting scene and ascertained that the spent shells at the shooting scene were consistent with the bullets in defendant's pistol.

A police officer brought Joe to the apartment complex where he identified the Mercedes, as follows: "Yeah, positively that's the car that shot at us, Sir. Yeah, that's the white car, Sir." When Chantel saw the Mercedes, she said that she was "1000 percent sure" that the Mercedes was the assailants' sedan.

Defendant and his two companions were arrested.

After a *Miranda* waiver,[4] defendant told the detective, "I f----- up, I f----- up really bad." He claimed that he had been with Larry M., John K., and another youth. They saw some Northside Longo gang members near Market and Orange Streets. He claimed that the Longo gang members were intimidating people. He said that he and his companions wanted to go there, "put them in check and let them know that the Asian Boyz ain't scared of them." Defendant said they were going to "blaze the Chongos."[5]

Defendant told the detective that initially he and his companions drove to a liquor store and when no one was there, they went to Orange and Market Streets, a known Longo gang hangout. There, they observed a male and female Hispanic standing out front of the residence in a driveway. They drove around the block, and returned to the same driveway. Defendant shot two rounds at the couple, and the Mercedes sped off. Defendant admitted that the handgun was a "gang gun." Defendant said that his moniker was "Happy" and that he had been a gang member since he was 16 years old. Larry M.'s moniker was "B-Loc" and John K.'s moniker was "T.K."

Detective Joe Pirooz, an experienced gang detective, testified to the foundational facts for a gang enhancement based on his familiarity with local Asian gangs. The detective opined that the shooting was committed for the benefit of the Asian Boyz gang. He testified that defendant was an admitted member of the Asian Boyz criminal street gang and that the Northside Longo gang and the Asian Boyz gang were "enemies." He explained that such a shooting is not just an attempt to scare the victim. Rather, during retaliatory gang shootings, gang members shoot to eliminate the enemy or possible enemy. These shootings are committed to eliminate the enemy and to strike fear in the hearts of rival gang members and into the neighborhood where the shooting is committed. Defendant told the detective that the Asian Boyz were tired of the rival gang robbing

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4 (*Miranda v. Arizona* (1966) 384 U.S. 436.)

5 The detective explained that "Chongos" is a derogatory gang term used to describe rival Hispanic gang members.

people and "tagging up" the area. So they went there "to put [the Northside Longos] in check."

Also, Detective Pirooz asserted that in a gang community, gang members retaliate against any "snitch" who testifies against another gang member, even if that person is the member of a rival gang. He explained that the term "snitch" is someone who gives up information or tattles on someone else to get favorable treatment. When a gang finds out that one of its members has cooperated with the police, they retaliate. It is common in gang cases for witnesses to be reluctant to cooperate and testify due to gang intimidation.

In defense, defendant declined to testify. Five defense exhibits were entered into evidence.

DISCUSSION

I. Sufficiency of the Evidemce

Defendant contends his convictions for the attempted murders in counts 1 and 2 must be reversed as there is insufficient evidence of the specific intent required for conviction. He argues that the prosecution used a "kill zone" theory of concurrent intent that did not apply.

A. Background

The jury found defendant guilty of attempting to murder Stacey in count 1. It found defendant guilty of the attempted willful, deliberate, and premeditated murder of Joe in count 2 and it acquitted defendant of the attempted murder of Chantel in count 3.

B. The Standard of Review

In reviewing a sufficiency of evidence claim, the reviewing court's role is a limited one. '"The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]'" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; see *Jackson v. Virginia* (1979) 443 U.S. 307, 319.)

"'"Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]" [Citation.]' [Citation.]" (*People v. Smith* (2005) 37 Cal.4th 733, 738-739 (*Smith*).)

C. The Mental State Required for Attempted Murder

The decision in *Smith, supra*, 37 Cal.4th 733 sets out the elements for a conviction of attempted murder. In explaining these elements, the *Smith* court repeated the basic proposition that the mental state for murder differs from attempted murder; no intent to kill is necessarily required for murder. However, for attempted murder, the People must prove "'the specific intent to kill'" the specific victim, as well as the commission of a direct but ineffectual act toward accomplishing the intended killing. (*Id*. at p. 739.) "Express malice requires a showing that the assailant '"'either desire[s] the result [i.e., death] or know[s], to a substantial certainty, that the result will occur.' [Citation.]"' [Citations.]" (*Ibid*.)

The doctrine of transferred intent, which applies to murder, does not apply to attempted murder. (*Smith, supra*, 37 Cal.4th at pp. 739-740.) As the court in *Smith* explained: "'In its classic form, the doctrine of transferred intent applies when the defendant intends to kill one person but mistakenly kills another. The intent to kill the intended target is deemed to transfer to the unintended victim so that the defendant is guilty of murder.' [Citation.] In contrast, the doctrine of transferred intent does not apply to attempted murder: 'To be guilty of attempted murder, the defendant must intend to kill the alleged victim, not someone else.' [Citation.] Whether the defendant acted with specific intent to kill 'must be judged separately as to each alleged victim.' [Citation.]" (*Id*. at p. 740.)

Specific intent rarely may be established by direct evidence. (*Smith, supra*, 37 Cal.4th at p. 741.) Motive is not an element of the offense of attempted murder. But

motive may constitute some circumstantial evidence of whether there is an intent to kill. (*Id*. at pp. 740-741.) Also, an intent to kill or express malice may be established by the defendant's acts and the circumstances of the crime. (*Id*. at p. 741.) For example, "'[t]he act of firing toward a victim at a close, but not point blank, range "in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill . . . ." [Citations.]'" and may demonstrate the requisite ""'animus to kill."'" (*Ibid*.) In such circumstances, the inference of an intent to kill is not dependent upon any further showing of any particular motive to kill the victim. (*Id*. at pp. 741-742.)

The court in *Smith*, *supra*, 37 Cal.4th at pages 745-746 discussed the "'kill zone'" theory addressed in *People v. Bland* (2002) 28 Cal.4th 313 (*Bland*). It said the following: "*Bland* simply recognizes that a shooter may be convicted of multiple counts of attempted murder on a 'kill zone' theory where the evidence establishes that the shooter used lethal force designed and intended to kill everyone in an area around the targeted victim (i.e., the 'kill zone') as the means of accomplishing the killing of that victim. Under such circumstances, a rational jury could conclude beyond a reasonable doubt that the shooter intended to kill not only his targeted victim, but also all others he knew were in the zone of fatal harm. [Citation.] As we explained in *Bland*, 'This concurrent intent [i.e., "kill zone"] theory is not a legal doctrine requiring special jury instructions . . . . Rather, it is simply a reasonable inference the jury may draw in a given case: a primary intent to kill a specific target does not rule out a concurrent intent to kill others.' [Citation.]" (*Smith*, *supra*, at pp. 745-746.)

"For example, an assailant who places a bomb on a commercial airplane intending to harm a primary target on board ensures by this method of attack that all passengers will be killed. Similarly . . . a defendant who intends to kill A and, in order to ensure A's death, drives by a group consisting of A, B, and C, and attacks the group with automatic weapon fire or an explosive device devastating enough to kill everyone in the group . . . has intentionally created a 'kill zone' to ensure the death of his primary victim, and the trier of fact may reasonably infer from the method employed an intent to kill others

concurrent with the intent to kill the primary victim." (*People v. Bland, supra*, 28 Cal.4th at pp. 329-330, quoting *Ford v. State* (Md. 1993) 625 A.2d 984.)

D. The Analysis

Defendant argues that his statements to the police indicated only an intent to frighten the victims, and even considering the other circumstantial evidence, the evidence fails to show that defendant had the specific intent for the attempted murders alleged in count 1 or count 2. Further, the evidence failed to show that he had the concurrent intent to kill Joe and Stacey.

Defendant's contention does not persuade us. It amounts to nothing more than an invitation to this court to reweigh the evidence and substitute its judgment for that of the jury. That is not the function of an appellate court. (*People v. Culver* (1973) 10 Cal.3d 542, 548.) Defendant's act of firing a lethal weapon at the victims from the Mercedes as they stood in a residential driveway gives rise to a reasonable inference that he intended to kill the people he described in his statement. He admitted that he could see the victims prior to the shooting. Although Joe, Stacey, and Chantel recanted at trial, apparently in compliance with the gang code, their statements to the officers at the time of the offense and defendant's own statements after his arrest indicate that the three of them were standing in a group on the driveway talking when defendant discharged his handgun at them.

Defendant endangered Joe's and Stacey's lives by discharging the firearm intending to wound or to kill them with his bullets. As defendant himself described it, he had equal reason to kill them both. He told the detective that the Asian Boyz had not discovered any male persons they could identify as Northside Longo gang members to shoot. So when they found a group of Hispanics, male and female, at a gang hangout, they decided to make this group their target instead. At trial, Detective Pirooz testified that generally such gang shootings are committed for the purpose of killing rival gang members or anyone else who might possibly be a rival gang member. Such evidence was sufficient basis for the jury to return guilty verdicts for the attempted murders of respectively, Stacey and Joe, in counts 1 and 2.

Defendant does not challenge the propriety of the trial court's jury instructions.

Nor at trial did defendant object to the prosecutor's remarks as prosecutorial misconduct, and he has not raised an issue of prosecutorial misconduct on appeal. Defendant's trial counsel argued a lack of concurrent intent during his final argument to the jury. (See *People v. Anzalone* (2006) 141 Cal.App.4th 380, 393; cf. *People v. Campos* (2007) 156 Cal.App.4th 1228, 1243.)[6]

II. The Sentencing Error Contentions

Defendant raises various sentencing error.

A. Background

In sentencing for count 2, the conviction of attempted deliberate and premeditated murder of Joe, the trial court imposed a life term, enhanced by a consecutive term of 20 years for the discharge of a firearm (§ 12022.53, subd. (c)), as well as by another consecutive term of 10 years for the gang enhancement (§ 186.22, subd. (b)(1)(C)).

For the attempted murder in count 1, the trial court imposed a middle term of seven years enhanced by a consecutive term of 25 years to life for the discharge of firearm proximately causing great bodily injury (§ 12022.53, subd. (d)) and by a 10-year term for the finding on the gang allegation (§ 186.22, subd. (b)(1)(C)).

For counts 4, 5 and 6, discharging a firearm at a person from a motor vehicle, the trial court imposed concurrent middle terms of five years each. The trial court ordered count 4 enhanced by a term of 25 years to life for the discharge of a firearm causing great bodily injury. (§ 12022.53, subd. (d).) For counts 5 and 6, the trial court imposed firearm discharge enhancements respectively, of 20 years to life. (§ 12022.53, subd. (c).)

For the assaults with a semiautomatic firearm in counts 7, 8 and 9 (§ 245, subd. (b)), the trial court imposed concurrent middle terms of six years. For count 7, it enhanced the term by three years for the infliction of great bodily injury (§ 12022.7,

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6 The decision in *People v. Stone* (2008) 160 Cal.App.4th 937, review granted June 25, 2008, S162675, has been ordered depublished. That decision addressed the propriety of using CALCRIM No. 600 to instruct the jury about a "kill zone" where the charge is attempted murder.

subd. (a)) and by another three years for the use of a firearm (§ 12022.5, subd. (a)(1)), and by 10 years for the gang enhancement (§ 186.22, subd. (b)(1)(C)). The trial court declined to impose the gang enhancements found true for counts 8 and 9 and stayed those terms pursuant to section 654.

The aggregate state prison term was 72 years to life, essentially consisting of a term of 30 years to life for Joe's attempted murder and a consecutive term of 42 years to life for Stacey's attempted murder.

B. The Authorized Term for the Gang Enhancement in Count 2

Defendant contends that the term imposed for the attempted murder in count 2 is unauthorized.

The People concede the point, and we agree.

The decisions in *People v. Lopez* (2005) 34 Cal.4th 1002, 1010-1011, and *People v. Montes* (2003) 31 Cal.4th 350, 355–356, settled the issue. The determinate term enhancement provided for in section 186.22, subdivision (b)(1)(C), is to be applied only when the conviction is for a violent felony for which a determinate term is proscribed. If the conviction is for a violent felony for which an indeterminate term of life in prison is proscribed, the limitation upon parole eligibility provided for in section 186.22, subdivision (b)(5), is applicable. If the parole limitation in subdivision (b)(5) is applicable, the 10-year enhancement is not. (*People v. Fiu* (2008) 165 Cal.App.4th 360, 390.)

Since the 10-year enhancement imposed in count 2 is unauthorized, we will order a remand for resentencing. Upon resentencing, the trial court shall reimpose the life term for count 2 with the service of a 15-year minimum term before defendant is eligible for parole.

We also note that count 2 cannot be designated as the principal term within the meaning of section 1170.1 as it is an indeterminate term of imprisonment.

C. Penal Code section 654

Defendant contends that there was only one course of violent conduct here and thus the ban on multiple punishment (§ 654) required that the trial court impose

punishment only as to one offense per victim. He also claims that, as to victim Chantel, the trial court improperly stayed the term imposed in count 9 pursuant to section 654, in lieu of staying the punishment imposed for count 6, an offense which carries a lesser term of punishment.

Section 654 provides that "(a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides *for the longest potential term of imprisonment,* but in no case shall the act or omission be punished under more than one provision." (Italics added.)

At the outset, we observe that it is settled that in determining the "longest potential term of imprisonment," a trial court may consider enhancements, as well as the term to be imposed for the offense itself. (§ 654; *People v. Kramer* (2002) 29 Cal.4th 720, 724-725.) In light of this well-known rule, the trial court properly ordered the term imposed for count 9 stayed, in lieu of that imposed for count 6. When the enhancement for count 6 is considered, it constituted the longest potential term of imprisonment.

Defendant is correct in asserting there was only one course of violent conduct here and that the multiple victim exception permitted the imposition of punishment for only one violent crime per victim. (*People v. Miller* (1977) 18 Cal.3d 873, 885, overruled on another point as explained in *People v. Oates* (2004) 32 Cal.4th 1048, 1068; *People v. Garcia* (1995) 32 Cal.App.4th 1756, 1781-1784; see also *People v. Kramer, supra,* 29 Cal.4th at pp. 722-723.) After imposing terms for counts 1 and 2, the attempted murders, and a term for the count 6 assault on Chantel, the trial court was not permitted to impose concurrent terms as punishment for counts 4, 5, 7, 8 and 9. It acted properly by ordering punishment stayed for the terms imposed in counts 8 and 9. However, this court will also order the terms of imprisonment which were previously imposed concurrently on counts 4, 5 and 7 to be stayed upon resentencing.

D. Disposing of the Section 12022.53 Enhancements

Defendant contends that the trial court did not explicitly dispose of the lesser firearm enhancements on counts 1, 2, 4, 5, and 6 pursuant to section 12022.53, subdivision (f).

Section 12022.53, subdivision (f), provides for an order staying any surplus firearm use or discharge enhancements found true with respect to an offense. Also, in *People v. Gonzalez* (2008) 43 Cal.4th 1118, the California Supreme Court held that when multiple enhancements are imposed for the use of a firearm pursuant to the provisions of sections 12022.53 and 12022.5, the trial court, after imposing the enhancement with the greatest prison term, must then order the remaining terms stayed. (*Gonzalez, supra,* at pp. 1122–1123, 1130.)

The People agree, as do we, that at sentencing the trial court failed to explicitly dispose of the surplus firearm enhancements. Upon resentencing, it should make such orders.

E. The Section 12022.53 Enhancements in Count 4, 5 and 6

Defendant contends that by statute, the enhancements described by section 12022.53, subdivisions (b) and (c), do not apply to the crime of discharging a firearm at another person from a motor vehicle, except insofar as a section 12022.53, subdivision (d), enhancement is pled and proved.

We agree with defendant. Had the prosecution alleged and proved section 12022.53, subdivision (d), enhancements for counts 5 and 6, those enhancements would have applied. (See *People v. Palacios* (2007) 41 Cal.4th 720, 731-732; *People v. Oates, supra,* 32 Cal.4th at pp. 1061-1062, 1066.) However, the People alleged a section 12022.53, subdivision (d), enhancement only as to count 4, and alleged only section 12022.53, subdivisions (b) and (c) enhancements in counts 5 and 6. By the explicit provisions of that section, section 12022.53, subdivisions (b) and (c) enhancements do not apply to an offense proscribed by section 12034.

Accordingly, we find that the 25-year-to-life enhancement is properly imposed as to count 4. But upon resentencing, the section 12022.53, subdivisions (b) and (c), enhancements in counts 5 and 6 must be stricken.[7]

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[7] We did not reduce the enhancement to a section 12022.5, subdivision (a)(1), enhancement as section 12022.5, subdivisions (a) and (d), indicate that that enhancement

F. The Unauthorized Terms Imposed for Firearm Discharge Enhancements

Defendant contends that in counts 2, 5, and 6, the trial court imposed unauthorized terms of 20 years to life for the section 12022.53, subdivision (c), enhancements, in lieu of the authorized term of 20 years.

It is unnecessary to address the issue of unauthorized terms for counts 5 and 6 as above we determined that the enhancements must be stricken.

At sentencing, for count 2, the trial court explicitly imposed a 20-year term for the discharge of a firearm enhancement, which is the authorized term of imprisonment. (§ 12022.53, subd. (c).) However, the abstract of judgment fails to conform to the oral proceedings of judgment. Consequently, we will order the abstract of judgment corrected.

G. The Summary of the Appropriate Terms and the Order for Remand

For the attempted murder in count 2 (Joe), the trial court properly should have imposed a term of life with the service of a 15-year term before parole eligibility (§ 186.22, subd. (b)(5)), plus a term of 20 years for the discharge of a firearm (§ 12022.53, subd. (c)).

For the attempted willful, deliberate, and premeditated murder in count 1 (Stacey), the term was properly imposed: a term of seven years, plus a consecutive term of 25 years to life for the discharge of a firearm (§ 12022.53, subd. (d)), plus a 10-year enhancement for the gang allegation (§ 186.22, subd. (b)).

For the discharge of a firearm at another from a motor vehicle in count 6 (Chantel), the trial court properly should have imposed a five-year term.

All other counts and enhancements were ordered stayed, or should have been ordered stayed pursuant to section 654.

The imposition of several unauthorized terms may have affected the trial court's discretionary sentencing choices. Accordingly, this court will reverse all the orders of

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also fails to apply as the use of a firearm is an element of the offense proscribed in section 12034.

sentencing and order a remand for resentencing so that the trial court can conform its sentence to the views expressed above and reconsider its discretionary sentencing choices. (*People v. Serrato* (1973) 9 Cal.3d 753, 764-765, disapproved on other grounds in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1; *People v. Ramos* (2004) 121 Cal.App.4th 1194, 1209.)

III. Cruel and Unusual Punishment

We decline to consider the contention of cruel and unusual punishment made on appeal as defendant will be resentenced and may raise the issue at resentencing in the trial court.

DISPOSITION

The orders of sentencing are vacated, and the matter is remanded for resentencing in conformity with the views expressed above. In all other respects, the judgment is affirmed.

In addition to any amendments required by the trial court's resentencing orders, the clerk of the superior court is ordered to amend the abstract of judgment with respect to the attempted murder in count 2 to show that the term imposed is life with the service of a minimum term of 15 years before parole eligibility.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD